Affirmed
Field
Judge Davis
Submitted

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~489~~. 269-57

WILLIAM C. GRAY, COLLECTOR OF INTERNAL REVENUE, PLAINTIFF IN ERROR,

vs.

WILLIAM DARLINGTON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

FILED JANUARY 18, 1871.

DEC. 2, 1872

SUPREME COURT OF THE UNITED STATES.

No. 489.

WILLIAM C. GRAY, COLLECTOR OF INTERNAL REVENUE, PLAINTIFF IN ERROR,

vs.

WILLIAM DARLINGTON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

INDEX.

	Original.	Print.
Petition for removal from court of common pleas, county of Chester	2	1
Writ of certiorari	4	2
Record of court common pleas, Chester County	8	3
Declaration	10	4
Pleas and demurrer	13	5
Replication and joinder in demurrer	14	5
Judgment for plaintiff on demurrer	16	6
Final judgment	17	6
Assignments of error	18	7
Citation	19	7
Writ of error	20	7
Certificate of clerk	21	8

1 WILLIAM DARLINGTON }
vs.
WILLIAM C. GRAY. }

UNITED STATES OF AMERICA.
Eastern District of Pennsylvania, ss:

Pleas before the honorable the judges of the circuit court of the United States in and for the eastern district of Pennsylvania in the third circuit. Of April sessions, 1870, No. 47.

Inter alia, it is thus contained:

Be it remembered that, on the twenty-ninth day of July, in the year of our Lord one thousand eight hundred and seventy, John K. Valentine, esquire, assistant district attorney of the United States for the eastern district of Pennsylvania, comes into court here and presents the petition of William C. Gray for the removal of a certain cause from the court of common pleas of the county of Chester, in the Commonwealth of Pennsylvania, which said petition being filed, is in the
2 words following, to wit:

To the honorable the circuit court of the United States for the eastern district of Pennsylvania in the third circuit:

Your petitioner, William C. Gray, respectfully represents: That suit has been commenced by William Darlington against him, by summons, case in the court of common pleas for the county of Chester, and State of Pennsylvania, No. 145, of August term, 1870.

That your petitioner is an officer of the United States, appointed under and acting by authority of the act of Congress, entitled "An act to provide internal revenue to support the Government, to pay interest on the public debt, and for other purposes," passed June 30th, 1864, and acts in addition thereto and in amendment thereof, to wit, collector of internal revenue of the United States for the seventh district, for assessing and collecting taxes in the State of Pennsylvania.

That the said suit has been brought against your said petitioner on account of an act done by him under color of his said office as said collector, the said suit having been brought by the said plaintiff to recover a certain sum of money from your said petitioner on account of
3 damages alleged to have been sustained by the said plaintiff by reason of the said defendant, in his said office, as said collector, and in his said official capacity having collected from the said William Darlington, a certain sum of money, to wit, one thousand (1,000) dollars, as tax due the United States.

Your petitioner therefore prays that the cause may be entered on the docket of your honorable court and proceeded in as in a cause originally commenced therein, and that a writ of certiorari be immediately issued by the clerk of your honorable court to said court of common pleas for the county of Chester, and State of Pennsylvania, according to the provisions of the act of Congress in such case made and provided.

And he will ever pray, &c.

W. C. GRAY,
Collector 7th Dist. of Pa.

William C. Gray, the above-named petitioner, being duly sworn ac-

cording to law, says that the facts set forth in the above petition, are true, to the best of his knowledge and belief.

W. C. GRAY.

Sworn and subscribed before me this 22d day of July, A. D. 1870.
W'M WHITEHEAD, *J. P.*

4 I hereby certify that, as counsel for said petitioner, William C. Gray, I have examined the proceedings against him and carefully inquired into all the matters set forth in the foregoing petition, and that I believe them to be true.

JOHN K. VALENTINE,
Ass't U. S. Attorney.

Which said petition having been filed, it was ordered by the court here that a writ of certiorari do immediately issue directed to the court of common pleas for the county of Chester aforesaid, which said writ being issued, was in the words following, to wit:

The President of the United States to the honorable the judges of the court of common pleas for the county of Chester, and State of Pennsylvania, greeting:

Whereas lately in your said court of common pleas, suit was brought against William C. Gray, by William Darlington, (No. 145 of August term, 1870,) in a plea of trespass on the case, which said
5 plea, as it is said, is still pending before you in the said court of common pleas for the county of Chester, undetermined. And whereas on the application of the said William C. Gray, to the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, on a suggestion supported by proper evidence, that the said suit was brought on account of an act done by him under and acting by authority of the act of Congress entitled "An act to provide internal revenue to support the Government, to pay interest on the public debt, and for other purposes," passed June 30, 1864, and acts in addition thereto and in amendment thereof, to wit, collector of internal revenue of the United States for the seventh district, for assessing and collecting taxes in the State of Pennsylvania. The said suit having been brought by the said plaintiff to recover a certain sum of money from the said defendant, on account of damages alleged to have been sustained by the said plaintiff, by reason of the said defendant in his said office as said collector, and in his said official capacity having collected from the said William Darlington, a certain sum of money, to wit, one thousand dollars, as taxes due to the United States.

6 He therefore respectfully prays that a writ of certiorari may be immediately issued by the clerk of the said circuit court of the United States, to the said court of common pleas for the county of Chester, requiring them to send into the said circuit court of the United States, the record and proceedings in the said cause, according to the provisions of the act of Congress in such case made and provided.

Wherefore you are hereby commanded to transmit under your seal, the record and proceedings of the said suit, with all things thereto relating, unto the said circuit court of the United States, to be holden at Philadelphia, for the eastern district of Pennsylvania, plainly and distinctly, in as full and ample manner as it now remains before you, together with this writ, so that the said circuit court of the United States

may be able therein to proceed, and do what shall appear of right ought to be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, at Philadelphia, this thirtieth day of July, A. D. 1870, and the ninety-fifth year of the independence
7 of the United States.

[SEAL.]

W. GRIER HIBLER,
Pro. Clerk C. C. U. S., E. D. of Pa.

And afterwards, to wit, on the third day of August, in the year of our Lord last aforesaid, the said writ of certiorari was returned into the said circuit court of the United States, with the record and proceedings of the said court of common pleas for the county of Chester, annexed, which said return and record being filed and read, are as follows, to wit:

To the honorable the judges of the circuit court of the United States for the eastern district of Pennsylvania:

I, S. G. Willauer, prothonotary of the court of common pleas of Chester County, Pa., do certify that the record and proceedings, and all things touching the case of William Darlington against William C. Gray, No. 145, August term, 1870, in as full and ample a manner as they now remain in said court, are to this writ attached.

Witness my hand and the seal of said court at West Chester, Pa., this first day of August, 1870.

[SEAL.]

S. G. WILLAUER,
Prothonotary.

8 To the hon. judges above named:

We do certify that the record and process, and all things touching the case within mentioned, as full and entire as they remain before us, we herewith send as we are commanded.

W'M BUTLER,
Pres't Judge.

STATE OF PENNSYLVANIA, *Chester County, ss:*

[SEAL.] Among the records of the court of common pleas of Chester County, it is thus contained:

Appearance docket entry.

August term, 1870.

Darlington and Cornwell.

WILLIAM DARLINGTON
vs.
WILLIAM C. GRAY. } 145.

Summons case issued July 19, 1870.

July 19, 1870, "Service accepted by William C. Gray, defendant."

July 19, 1870. Narr. filed.

9 WILLIAM DARLINGTON
vs.
WILLIAM C. GRAY.

Issue, summons case.
Yours, &c.,

DARLINGTON & CORNWELL,
Pl'ff Att'ys.

S. G. WILLAUER, Esq.,
Prot.

CHESTER COUNTY, *ss:*

[SEAL.] The Commonwealth of Pennsylvania to the sheriff of Chester county, greeting:

We command you to summon William C. Gray late of your county, so that he be and appear before our judges at West Chester, at our county court of common pleas, there to be held, in ten days after the service of this writ, to answer William Darlington of a plea of trespass on the case, &c., to his damage &c. And have you then and there this
10 writ.

Witness the Hon. William Butler, president of our said court at West Chester, the nineteenth day of July in the year of our Lord one thousand eight hundred and seventy.

S. G. WILLAUER,
Prothonotary.

I accept service of this writ.

W. C. GRAY,
Collector 7 Dist., Pa.

WEST CHESTER, *July* 19*th*, 1870.

August term, 1870.

CHESTER COUNTY, *ss:*

William Darlington complains of William C. Gray who has been summoned to answer the plaintiff in an action on promises, for that whereas the plaintiff resides in West Chester, in the seventh internal revenue collection district of the State of Pennsylvania, and made to Charles B. Shephard, assistant assessor of internal revenue for the borough of West Chester, the proper return of his annual gains, profits, and income for the year 1869, under the provisions or the several acts of Con-
11 gress to provide internal revenue; and, in addition thereto, upon the requirement of the said assistant assessor, and protesting that he was not legally bound to make such return, he further returned that, prior to the year 1865, he owned United States Treasury seven and three-tenths notes, and in that year exchanged them with the Government for United States five-twenty bonds at par, and sold those bonds in 1869 at an advance over the cost of said notes of $20,000, and the said assistant assessor assessed a tax of five per cent. upon the said sum of $20,000, amounting to $1,000, alleging it to be annual gains, profits, and income of the year 1869; and thereupon the plaintiff appealed in writing from the said assessment to William E. Barber, esq., assessor of said collection district, and stated as the ground of such appeal that the said sum of $20,000 was not annual gains, profits, and income of the year 1869, and the said assessor affirmed the said assessment; and thereupon the

plaintiff appealed in writing from the decision of the said assessor to the Commissioner of Internal Revenue, and stated as the ground of such appeal that the said sum of $20,000 was not annual gains, profits, and income of the year 1869, and asked that the said tax of $1,000
12 should be remitted and the said Commissioner affirmed the decision of the said assessor and refused to remit the said tax, and the said assessor transmitted the said assessment to the said William C. Gray, the collector of the said district, and the said William C. Gray, as such collector, demanded in writing of the plaintiff payment of the said tax on or before the 18th day of July, 1870, with notice that, unless paid within that time, he would collect the same with a penalty of five per centum additional, and interest at one per centum per month; and thereupon the plaintiff, protesting that the said tax was illegal and that the defendant had no right to collect the same, on the 18th day of July, 1870, paid the said sum of $1,000 to the defendant and the defendant thereupon became liable to pay the same to the plaintiff, and being so liable in consideration thereof, then promised the plaintiff to pay him the said sum of $1,000, on request, yet he has not paid any part thereof, to the plaintiff's damage two thousand dollars.

W'M DARLINGTON.

13 And afterwards, to wit, on the twenty-second day of September, in the year of our Lord one thousand eight hundred and seventy, the said William C. Gray, the defendant, by Aubrey H. Smith, esquire, his attorney, comes into our said circuit court here, and files his pleas and demurrer to the declaration of the said plaintiff, which being read, are as follows, to wit:

Pleas.

And the said defendant, by Aubrey H. Smith, esquire, his attorney, comes and defends the wrong and injury, when, &c., and saith that he did not undertake or promise in manner and form as the said plaintiff hath above thereof complained against him; and of this he puts himself upon the country, &c.

Demurrer.

And the said defendant, by Aubrey H. Smith, his attorney, comes and defends the wrong and injury, when, &c., and says that the said declaration, and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient
14 in law for the said plaintiff to have or maintain his aforesaid action thereof against the said defendant; and he, the said defendant, is not bound by law to answer the same, and this he is ready to verify: Wherefore, by reason of the insufficiency of the said declaration in this behalf, the said defendant prays judgment, and that the said plaintiff may be barred from having or maintaining his aforesaid action thereof against him, &c.

AUBREY H. SMITH,
For Def't.

And afterwards, to wit, on the thirteenth day of October, in the year last aforesaid, the said plaintiff, William Darlington, comes into our said court here, and files of record his replication and joinder in demurrer, which are as follows, to wit:

Replication and joinder in demurrer.

1. And the said plaintiff, as to the plea of the said defendant first above pleaded, and whereof he hath put himself on the country, doth the like.

15 2. And the said plaintiff further saith, as to the plea of the said defendant secondly above pleaded, that the said declaration, and the matters therein contained in manner and form as the same are above stated and set forth, are sufficient in law for him, the said plaintiff, to have and maintain his aforesaid action thereof against the said defendant; and the said plaintiff is ready to verify and prove the same, as the court here shall direct and award: Wherefore, inasmuch as the said defendant hath not answered the said declaration, nor hitherto in any manner denied the same, the said plaintiff prays judgment, and his damages by reason of the not performing of the said several promises and undertakings in the said declaration mentioned, to be adjudged to him, &c.

And afterwards, to wit, on the day and year last aforesaid, the said defendant, by Aubrey H. Smith, esquire, his attorney, leave of the court being first had and obtained, withdraws his said plea of non-assumpsit.

16 And afterwards, to wit, on the day and year last aforesaid, come the parties aforesaid, by their attorneys aforesaid, upon which the record and matters aforesaid having been seen, and by the court now here fully understood, and all and singular the premises having been examined, and mature deliberation being had thereupon, for that it seems to the court that the demurrer aforesaid is not sufficient in law, and that the plaintiff aforesaid ought to have and maintain his said action against the said defendant, as the said plaintiff has above alleged, by reason whereof the said plaintiff ought to recover from the said defendant his damages by occasion of the premises, but because it is unknown to our said court here what damages the said plaintiff has sustained in the premises, as for his costs and charges by him about his suit in this behalf expended, day is therefore given to the said parties to be before the court, to wit, on the twenty-ninth day of October, in the year aforesaid, for hearing judgment of and upon the premises, because the said court here is not yet advised

17 thereupon. At which said day, to wit, on the twenty-ninth day of October aforesaid, before our said court, comes the said William Darlington, where, upon the premises being seen and fully understood by the court here, and mature deliberation being had thereon, it is considered that the said William Darlington do recover from the said William C. Gray his damages aforesaid, to wit, the sum of one thousand dollars, *principle*, paid by him, together with the interest thereon from the eighteenth day of July, 1870, to the thirteenth of October, 1870, amounting in all to one thousand and fourteen dollars and sixteen cents; and, also, forty-four dollars and ninety-five cents adjudged to the said William Darlington by the court now here, at his request, for increase of his said costs and charges, which said damages in the whole amount to the sum of one thousand and fifty-nine dollars and eleven cents, ($1,059 11.) And the said defendants in mercy, &c.

18 And afterwards, to wit, on the fifteenth day of November, in the year of our Lord last aforesaid, come the said William C.

Gray, the defendant, by Aubrey H. Smith, esquire, his attorney, and files his assignments of error, which being read, are as follows, to wit:

Afterwards, to wit, on the first Monday of December, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said William C. Gray, by Aubrey H. Smith, his attorney, and says that in the record and proceedings aforesaid there is manifest error in this, to wit, that by the record aforesaid it appears that the judgment aforesaid given was given for the said William Darlington against the said William C. Gray, whereas by the law of the land the said judgment ought to have been given for the said William C. Gray against the said William Darlington; and the said William C. Gray prays that the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he has lost by occasion of
19 the said judgment, &c.

AUBREY H. SMITH,
Att'y for Pl'ff in Error.

UNITED STATES OF AMERICA, *ss:*

To William Darlington, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, wherein the said William C. Gray, plaintiff, and you the said William Darlington, are defendant in error, to show cause, if any there may be, why judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this 24th day of November, A. D. 1870.

[SEAL.] WILLIAM STRONG,
One of the Justices of the Supreme Court U. S.

NOVEMBER 26, 1870.—I accept service of the above writ.
W'M DARLINGTON.

20 UNITED STATES,
Eastern District of Pennsylvania, set:

[SEAL.] The President of the United States to the judges of the circuit court of the United States in and for the eastern district of Pennsylvania, greeting:

Because that in the record and process and also in the rendering of judgment in a suit before you, between William Darlington, plaintiff, and William C. Gray, defendant, in a plea of trespass on the case a manifest error has intervened to the great damage of said defendant, as in their complaint has been stated, and as it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf, you are hereby commanded that if judgment thereof be given, then under your seal you do distinctly and openly send the record and process in the suit aforesaid, with all things concerning them

and this writ, so that you have the same before the justices of the Supreme Court of the United States, at a court to be holden at Washington, on the first Monday of December next, that the record and process aforesaid being inspected, they may cause to be done thereupon what of right ought to be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, at Philadelphia, this third day of November, A. D. one thousand eight hundred and seventy, and in the ninety-fifth year of the independence of the said United States.

W. GRIER HIBLER,
Pro Clerk C. C. U. S., E. D. Pa.

Allowed by—

W. STRONG,
One of the Justices of the Supreme Court U. S.

21 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, set:

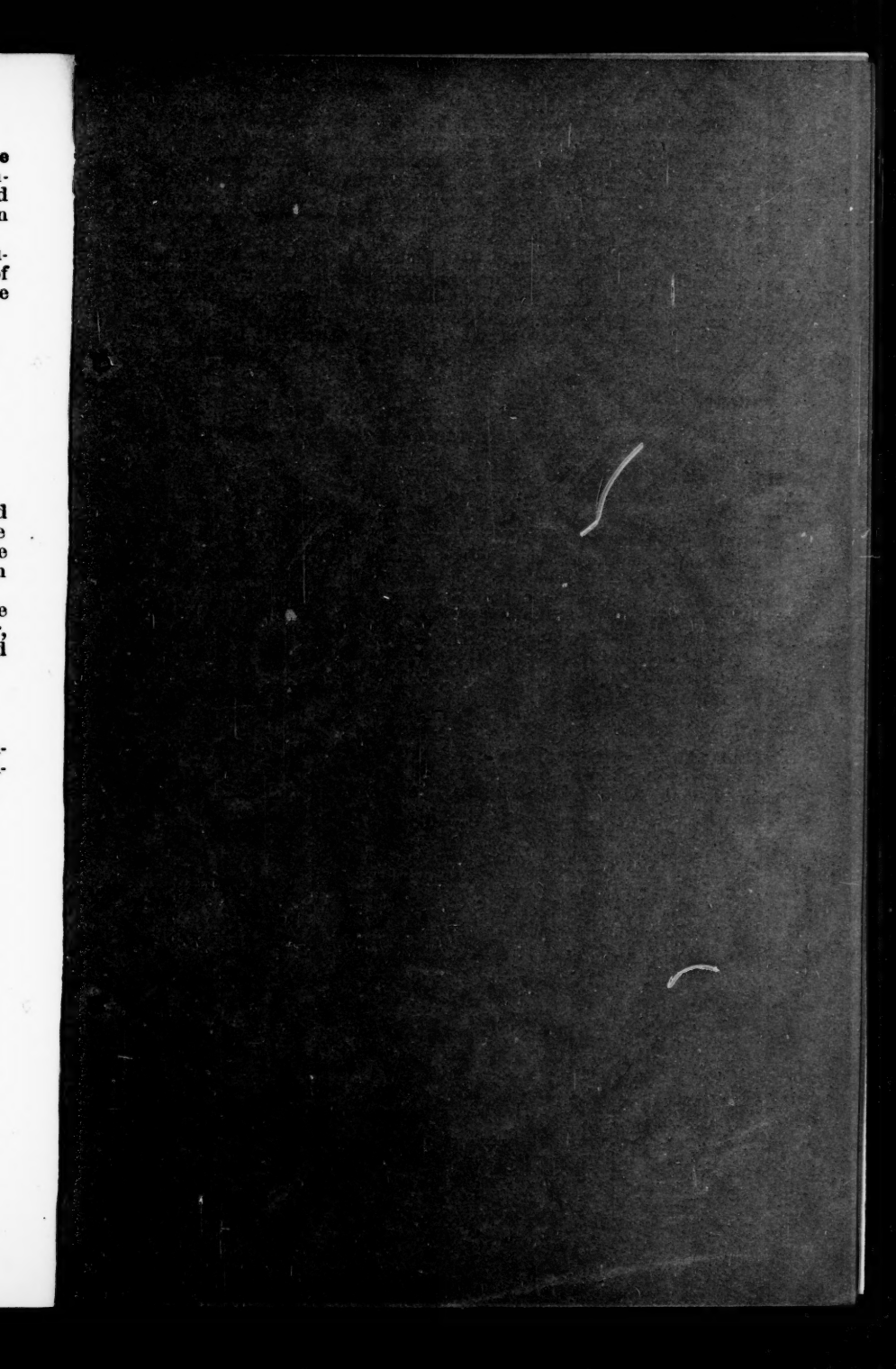
I, Samuel Bell, clerk, do hereby certify the foregoing to be a true and faithful copy of the record and proceedings of the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, in a certain suit therein lately depending between William Darlington, plaintiff, and William C. Gray, defendant.

In testimony whereof I have hereunto set my hand and seal of the said circuit court at Philadelphia, this twenty-ninth day of November, A. D. 1870, and in the ninety-fifth year of the independence of the said United States.

[SEAL.]

SAMUEL BELL,
Clerk Cir. Ct U. S., E. D. of Pa.

(Indorsement on cover:) No. 489. William C. Gray, collector of internal revenue, plaintiff in error, vs. William Darlington. E. Pennsylvania C. C. U. S. Filed 18th January, 1871.



In the Supreme Court of the United States.

DECEMBER TERM, 1871.

WILLIAM C. GRAY, COLLECTOR OF INTERNAL REVENUE, PLAINTIFF IN ERROR,
vs.
WILLIAM DARLINGTON.

No. 269.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Brief for the plaintiff in error.

In the Supreme Court of the United States.

DECEMBER TERM, 1871.

WILLIAM C. GRAY, COLLECTOR OF internal revenue, plaintiff in error,
vs.
WILLIAM DARLINGTON.
} No. 269.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Brief for the plaintiff in error.

STATEMENT.

This was an action of assumpsit brought by the defendant in error against the plaintiff in error, to recover the sum of $1,000 claimed to have been illegally assessed and collected, under the internal-revenue laws, as income-tax.

It appears that the plaintiff below, prior to the year 1865, owned United States Treasury seven-thirty notes, which he in that year exchanged with the Government for United States five-twenty bonds at par. In the year 1869, he sold these bonds at an advance over the cost of said notes of $20,000, upon which a tax of five per cent. was assessed against him by the assistant assessor of the district, as income for that year. An appeal was taken to the assessor of the district, who affirmed the assessment; whereupon the plaintiff appealed to the

Commissioner of Internal Revenue, by whom the decision of the assessor was sustained. Afterward, upon demand of the collector, the tax was paid by the plaintiff under protest. To recover back this tax was the object of the action.

The suit was commenced in the court of common pleas of Chester County, Pennsylvania, on the 19th of July, 1870, and thence removed by certiorari into the circuit court of the United States for the eastern district of Pennsylvania. To the declaration, setting forth substantially the facts above stated, the defendant demurred. The demurrer was overruled by the circuit court, and judgment given in favor of the plaintiff on the 29th of Oct., 1870, for the amount sued for, with interest and costs.

The overruling of the demurrer is the error complained of.

The question in the case is, whether the $20,000 advance over cost, realized by the sale of the bonds, was subject to income-duty.

The internal-revenue law, relating to income-taxation, in force when the tax mentioned was assessed, is found in the following provisions: Section 13 of the act of March 2, 1867, amendatory of sections 116, 117, 118, 119, and 123 of the act of June 30, 1864, (see 14 Stat. pp. 477 to 480;) section 9 of the act of July 13, 1866, amendatory of sections 120 and 122 of the act of June 30, 1864, (14 Stat. pp. 138, 139;) and section 121 of the act of June 30, 1864, (13 Stat. p. 284.)

ARGUMENT.

Section 13 of the act of 1867 provides: "That there shall be levied, collected, and paid annually upon the *gains, profits, and income* of every person, * * * * whether derived from any kind of property, rents, interest, dividends, or salaries, or from any profession, trade, employment, or vocation, * * * * *or from any other source whatever*, a tax of five per centum on the amount so derived over one thousand dollars, etc. (14 Stat., 478.)

The same section further enacts: "That, in estimating the gains, profits, and income of any person, there shall be included, [in addition to such as are derived from certain specified sources,] *all other gains, profits, and income, derived from any source whatever*," with some exceptions of no importance in connection with this case.

The language here employed by Congress is sufficiently comprehensive to include, as a taxable gain or profit, the advance at which the plaintiff below sold his bonds over and above the cost of the notes previously given by him in exchange for those same bonds.

By reference to the section of the act of 1867, already quoted from (14 Stat., 478,) it will be observed that, among the gains required to be included in the assessment, are "profits realized within the year from sales of real estate purchased within the year, or within two years previous to the year for which income is estimated." This provision impliedly excludes from taxation such gains as are derived from sales of real estate purchased two years before the revenue year in which the sale occurs. But it is significant that, in regard to personal property, no condition as to time of purchase is imposed by the statute. The limitation as to real property cannot be extended by implication to personal property upon any recognized principle of interpretation. On the contrary, the mere fact that profits on sales of real estate which has been held two years or more, are made an exception to the general provision taxing all gains, profits, and income, while no such exception is made in respect of personal property, but strengthens the inference that no such exception was intended.

Accordingly, in the assessment, under the statute, of gains or profits made within the year on sales of personal property, it is submitted that no regard could have been had to the time when the property was purchased. If the rule were otherwise, and profits on sales of personal property became taxable under the internal-revenue law only in cases where the property had been bought within the year, the income of merchants and traders would, to a great extent, have been practically

exempt from taxation, and an immense volume of the wealth and enterprise of the country thus relieved from bearing its share of the public burdens. No good reason is perceived why personal property, such as bonds, from the sale of which a profit is realized, should be treated differently in this respect from other personal property employed in commerce.

In the present case, whether the plaintiff below became the owner of the bonds within the year in which the sale occurred, or during the year previous, or at a period still more remote, seems therefore to be entirely immaterial. The statute regards not the time when the property was acquired, but only the profit realized by the owner therefrom; and the substantial fact appears that, in the year 1869, he made a clear profit of $20,000 by the sale of his bonds, upon which, we submit, a duty was clearly chargeable under the provisions of law referred to.

The case of Richey *vs.* Williams, No. 185, December term, 1870, in which this court divided in opinion, is distinguishable from the present case in this: there the tax was assessed upon the *estimated difference* between the market-value of certain stock on the 1st of January, 1867, and the market-value of certain bonds for which that stock was exchanged within the same year; here the tax was assessed upon *a gain actually realized* on the sale of bonds during the year 1869, beyond what those bonds cost the vendor in a previous year.

GEO. H. WILLIAMS,
Attorney General.
C. H. HILL,
Assistant Attorney General.

In the Supreme Court of the United States

DECEMBER TERM, 1870.

WILLIAM C. GRAY, *Collector of Internal Revenue, Plaintiff in Error,*
vs.
William Darlington.
No. 489.

In error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

In the Supreme Court of the United States

DECEMBER TERM, 1870.

WILLIAM C. GRAY, *Collector of Internal Revenue, Plaintiff in Error,*
vs.
William Darlington.
No. 489.

In error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

BRIEF OF DEFENDANT IN ERROR.

This is a suit brought by the defendant in error against the plaintiff in error, in the Court of Common Pleas of Chester county, Pennsylvania, to recover the sum of $1,000, alleged to have been illegally assessed and collected as income tax, under the internal revenue laws, in the seventh collection district of that State, and was removed, at the instance of the Government, into the Circuit Court of the United States for trial.

The declaration, which was filed in the Common Pleas, July 19, 1870, sets forth, that the plaintiff resides in West Chester, in the seventh collection district of that State, and made to the assistant assessor of internal revenue of the borough of West Chester, the proper return of his annual gains, profits and income for the year 1869, under the provisions of the several Acts of Congress to provide internal

revenue, and in addition thereto, upon the requirement of the said assistant assessor, and protesting that he was not legally bound to make such return, he further returned, that prior to the year 1865, he owned United States Treasury seven and three-tenths notes, and in that year exchanged them with the Government for United States five-twenty bonds at par, and sold those bonds in 1869, at an advance over the cost of said notes of $20,000, and the said assistant assessor assessed a tax of five per cent. upon the said sum of $20,000, amounting to $1,000, alleging it to be annual gains, profits and income of the year 1869; that the plaintiff appealed in writing from the said assessment to the assessor of said collection district, stating as the ground of such appeal that the said sum of $20,000 was not annual gains, profits and income of the year 1869; that the said assessor affirmed the said statement; that thereupon the plaintiff appealed in writing from the decision of the assessor to the Commissioner of Internal Revenue, and stated as the ground of his appeal that the said sum of $20,000 was not annual gains, profits and income of the year 1869, and asked that the said tax of $1,000 should be remitted, and the said Commissioner affirmed the decision of the assessor and refused to remit said tax; that the assessor transmitted the said assessment to the said Wm. C. Gray, the collector of said district, who demanded in writing of the plaintiff payment of the said tax, on or before July 18, 1870, with notice that unless paid within that time he would collect the same with penalty and interest, and thereupon the plaintiff, protesting that the said tax was illegal, and that the defendant had no right to collect the same, on the 18th of July, 1870, paid the said sum of $1,000 to the defendant, and that thereupon the defendant became liable to pay it back and promised to do so.

The defendant demurred to the declaration, and the plaintiff joined in demurrer.

Upon argument, the Circuit Court, on the 29th of Oct.

1870, gave judgment for the plaintiff for $1,000, with $14.16 interest, and $44.95 costs, altogether $1,059.11.

I.

The internal revenue law relating to incomes in force when this tax was assessed, is Sec. 13 of the Act of March 2, 1867, amendatory of Sections 116, 117, 118, 119 and 123, of the Act of June 30, 1864, (see 14 Stat. p. 477 to 480.)

What is the meaning of the term *income?*

As defined by Webster, it is "That gain which proceeds from labor, business or property of any kind; the produce of a farm; the rent of houses; the proceeds of professional business; the profits of commerce or occupation; the interest of money or stock in funds." "We speak of the annual income of a gentleman, and the annual revenue of the State."

As defined by Worcester, it is "gain derived from any business, or property, produce, profit, revenue."

The universal understanding and meaning of the term *revenue*, it is submitted, is *annual* gains, profits or receipts. Whenever used, it conveys but one idea to the mind—annual gains or profits—and is never to be found except in association with that idea. True, one may speak of a daily or weekly income, but this is exceptional; and unless so limited, the common understanding annexes *annual* to the term.

The term *income* in the internal revenue law, beyond all doubt means *annual income.*

By the act of March 2, 1867, section 13, "There shall be levied, collected and paid *annually* upon the gains, profits and income of every person, * * * whether derived from any kind of property, rents, interest, dividends or salaries, or from any profession, trade, employment or vocation, * * * * or from any other source whatever * * * a tax of five per centum on the amount so derived over $1,000." "And the tax herein provided for shall be assessed, collected and paid upon the gains, profits and in-

come *for the year ending the* 31*st of December next preceding* the time for levying, collecting and paying said tax."

"In estimating the gains, profits and income of any person, there shall be included all incomes derived from interest upon notes, bonds and other securities of the United States, * * * interest received or accrued, * * * if good and collectable, * * * premium on gold and coupons, * * * sales of live stock, sugar, wool, butter, cheese, pork, beef, mutton or other meats, hay and grain, or other vegetable or other productions, being the growth or produce of the estate."

It will be observed that the act of Congress places in the same category rents, interest, dividends, salaries, professions, trades, employments, sugar, wool, butter, cheese, and other produce of farms. All these are *annual products and income*, and no other meaning can be attached to them.

The act of Congress still more clearly evinces this meaning, when it declares that the tax shall be paid *annually* upon the income, * * * * and shall be assessed * * * *for the year ending* 31*st of December next preceding.*

It is thus clear from the whole scope and tenor of the Act that *annual incomes only* can be taxed.

II.

The *advance in value* of any bonds, stock or other personal property, through a series of years, is not *annual income.*

If Congress had designed to make it such, they would have employed the proper language. They have nowhere intimated such purpose. On the contrary, when in the same section they provide that "profits realized within the year *from sales of real estate* purchased within the year, or within two years previous to the year for which income is estimated," shall be included as income for that year, they exclude all notion of applying such a rule to personal estate. *Expressio unius est exclusio alterius.*

The general words in the same section, "all other gains, profits and income derived from any source whatever," can-

not be construed to extend beyond the income of the year preceding the assessment.

What would be the effect of adopting the construction of the Revenue officers? The principle enunciated by them is unlimited, *as to time*, in its application. If the gradual advance in the value of the bonds in question between 1865 and 1869 is income of the latter year, so would it be if the advance had been through any number of years.

A purchaser of Bank, Railroad, Insurance or other stock at par, thirty years ago, who should sell it at an advance over its cost of fifty per cent. in 1869, would in like manner be liable to the tax thereon, although no advance whatever might have taken place within the last ten years prior to the sale.

It is respectfully submitted that such construction would be wholly admissible.

Such appreciation in value of real or personal estate must be treated as *increase of capital*, and in no sense as *income*.

In like manner, one who may have purchased oil, or other stocks ten or twenty years ago, and disposed of them in 1869 for less than cost, must be esteemed to have suffered a *loss of capital*, and not of *income* of that year.

In Richey vs. Williams, No. 185, to December Term, 1870: the question was whether the advance in value of Railroad stock between the beginning and end of the same year, was income of that year. Upon that question the Court divided in opinion. It is submitted that in this case, the advance in value of the bonds not being within any one year, presents much stronger reason against its being considered income of the last of those years.

WILLIAM DARLINGTON,

Jan. 22, 1872. *Defendant in Error.*